

# INNOCENCE PROJECT

Benjamin N. Cardozo School of Law, Yeshiva University

(to BEHEARD  
SENATE JUDICIARY 2/20)  
EXHIBIT NO. 1  
DATE 2/20/09  
BILL NO. SB 447

February 17, 2009

Chairman Gary Perry & Members of the Senate Judiciary Committee  
Montana Senate  
P.O. Box 200500  
Helena, MT 59620-0500

## Re: SB 447 & LC 2228, Clarifying the Preservation of DNA Evidence in Felony Cases

Dear Chairman Perry and Members of the Senate Judiciary Committee:

On behalf of the Innocence Project, we wish to personally thank the Montana legislature for seeking to bolster Montana's preservation of evidence practices. As you know, poorly preserved, lost, or destroyed evidence can frustrate even the most aggressive efforts to solve cases, whether it be a cold case, or one that seeks to exonerate someone who may have been wrongfully convicted. There are currently two bills before the Montana legislature that would address the proper preservation of evidence, both of which are critically important and neither of which, on its own, would provide a comprehensive solution to a looming problem for the state of Montana. SB 447 will codify the state crime lab's current practice to preserve DNA evidence longterm, and a second bill LC 2228 (no final number yet) will study the preservation of other biological evidence kept by other agencies in the state, such as local law enforcement agencies, and recommend improvements to their existing practices.

We founded the Innocence Project in 1992 at the Benjamin N. Cardozo School of Law to exonerate the innocent through post-conviction DNA testing. Since its introduction, forensic DNA testing has proven the innocence of 232 people. Not one of these exonerations would have been possible without the proper retention of biological evidence, nor would the identification of many of the actual perpetrators of those crimes. To date, the real perpetrators have been identified among 100 of the 232 exonerated (43%).

Our nation's evidence rooms have become crime-solving goldmines. Understandably, when legislation is considered, evidence custodians become concerned that they will be expected to save evidence for which they have no room. Those concerns are precisely what this legislation intends to address. The goal of a study group, after all, is to help define what evidence needs to be saved and what can be destroyed without consequence. In the interests of justice, many agencies err on the side of saving too much evidence, which is bound to lead to storage space issues in the future.

A study group can devise thoughtful recommendations that isolate only that evidence that must be preserved and identify destruction policies for that evidence which can be destroyed. The provision of guidance and direction to evidence custodians will *not* create an unfunded mandate; in fact, it will – through the identification of evidence that can, by law, be destroyed – save money over time by creating space for future evidence.

Practical considerations have to be balanced with the notion of preserving *all* biological evidence, but the formation of a study group will provide a forum that can allow for thoughtful deliberation about how to best preserve critically important evidence – evidence that could settle innocence claims and identify the true perpetrators of crime.

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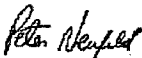
Indeed, new forms of DNA analysis make it possible to test evidence that even just a few years ago could not have yielded probative results. MiniFiler amplification and mitochondrial testing, among the recent advances, has made it possible to learn more than ever before from limited, or degraded, evidence. Additionally, a mask, or another piece of clothing found at a crime scene contains skin cells that have only recently (in the last five years at most) been subjected to DNA testing with any regularity. Such testing has resulted in the exoneration of wrongfully convicted people in a number of cases (examples of which are described in the appendix). Moreover, it has led investigators to the true perpetrators of the crimes through CODIS hits, or to potential suspects through non-CODIS exclusion of the convicted and inclusions of other suspects.

A review of the NIJ's list of items where biological evidence can be found illustrates the variety of items that can be successfully tested with improved technology: fingernail scrapings analyzed with Y DNA tests; skins cells in the hinge of eyeglasses; dandruff, saliva, hair, sweat, and skin cells from hats, bandanas and masks; saliva cells on tape or ligatures; traces of blood on a bullet; traces of blood and/or hairs on, or in the crevices of, a variety of weapons used to inflict injury; or even blood and tissue cells swabbed from the bullet inside a gun, identifying the person who might have last loaded it.<sup>1</sup> The list of these bulk evidence items that are being successfully tested now, but could never have been tested successfully only a few years ago, is enormous.

Safeguarding biological evidence is in the interests of all of members of the criminal justice community, from crime victims to law enforcement to the wrongfully convicted. In a large portion of cases in which the innocent are exculpated, the guilty are also identified through CODIS hits. Many states have begun to realize that their retention policies fail to keep up with DNA's technological advances. Just last year, three states passed laws that mandated the preservation of biological evidence in several crime categories. A study bill promises to shape an evidence management policy that is respectful of the state-specific concerns offered by a range of stakeholders.

Once again, thank you for your efforts to improve Montana's evidence scheme. Please feel free to call upon us at any stage in your work. We are grateful to you for all that you have done thus far, and your anticipated attention to a matter that has the potential to exculpate some Montanans, identify criminals, and serve as a model for the rest of the country.

Sincerely,



Peter Neufeld  
Co-Director



Barry C. Scheck  
Co-Director

<sup>1</sup> In the 2002 report by the National Institute of Justice, "Using DNA to Solve Cold Cases" available at <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf>, the authors identify "some common items of evidence that may have been collected previously but not analyzed for the presence of DNA evidence (Exhibit 4), p. 21.

**APPENDIX – Case Studies Demonstrating the Critical Need to Preserve Biological Evidence and/or the Value of Subjecting Old Evidence to Modern DNA Testing Methods**

**Luis Diaz:** Luiz Diaz's case involved multiple rapes. Although he was convicted in 1980, it wasn't until 2005 that Mr. Diaz was released from a Florida prison after DNA testing of a rape kit proved that he was not the notorious "Bird Road Rapist." This individual had been responsible for the attacks, and in some cases sexual assaults, of more than twenty-five women. By the time Mr. Diaz petitioned for testing in 2003, the only evidence that could be located was one rape kit, which was sent to a private lab in California. As the results were awaited, more evidence from the same case was located and sent to the Miami Dade Police Department Crime Lab. In June of 2005, testing results from both labs indicated that the male profile that was found did not match Mr. Diaz. Prosecutors then searched for evidence in all of the cases attributed to the Bird Road Rapist. Only one rape kit was located from an uncharged crime that occurred in August 1979. This kit was sent to the Miami Dade Police Department Crime Laboratory. The results indicated that, again, Luis Diaz was not the male contributor to the semen evidence. Further, the tests yielded evidence that the same unknown male had raped both victims, thereby providing investigators with important information with which to pursue the cold cases. Had the evidence in Mr. Diaz's case been lost or destroyed, he would have died in prison. None of the evidence in Mr. Diaz's case had previously been subjected to DNA analysis, as the technology was simply unavailable at the time of his conviction.

**Scott Fappiano:** Scott Fappiano was convicted of a rape in 1985 and consistently maintained his innocence throughout his incarceration. While a wealth of samples had been collected from the crime scene, DNA technology at the time was not sufficient to produce a result that would conclusively identify the perpetrator of the heinous crime for which he was convicted. Some exhibits containing biological evidence used at trial were returned to the DA's office; others were vouchered and sent to New York Police Department evidence storage facilities. Two items of evidence – the rape kit and a pair of sweatpants containing semen stains—were sent in 1989 by the DA's office to a now-defunct DNA laboratory called Lifecodes, which at the time performed rudimentary DNA analysis for the state of New York. DNA in the late 1980's was limited, and although Lifecodes found semen to be present on the available evidence, they could not produce a conclusive result. In 1998, more advanced DNA testing methods had developed and a search for the original crime scene evidence was initiated. The DA's office fully cooperated with a search of its storage areas, but none of the original exhibits could be located. A similar search of NYPD storage facilities yielded nothing. After a long and uncertain search, Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab, was contacted. Remarkably, in August of 2005, two test tubes containing biological samples from the crime scene were located. DNA testing of those extracts, using more progressive DNA testing methods, excluded Mr. Fappiano. He was freed from prison in October of 2006 – 21 years after his wrongful conviction. Had the liquid DNA material not been preserved by a private lab, Mr. Fappiano would still be in prison despite his actual innocence. Like Mr. Heins's case, Mr. Fappiano's case also demonstrates the value of subjecting preserved biological evidence to modern DNA testing methods.

**Calvin Willis:** Calvin Willis was convicted in 1982 of the brutal rape of a ten-year-old girl in Louisiana. Critical evidence had been collected, including a rape kit that contained fingernail scrapings, a bedspread, the victim's underwear and nightgown, and a pair of boxer shorts that were left on the couch at the crime scene. DNA testing wasn't yet available and so the state crime lab performed conventional serological testing on the rape kit evidence and blood typing on stains from the nightgown and bedspread. Because the victim is a type A secretor and Willis is an O secretor, he could not be excluded as the contributor to the stain. Perhaps even more troubling, Mr. Willis was identified through a flawed lineup procedure. In

1998, our office accepted his case and DNA testing was performed on the boxer shorts and the fingernail scrapings. Mr. Willis was excluded from being a contributor to any of the samples. He was released from prison in 2003, after having spent more than 21 years behind bars. Had it not been for the preserved evidence – which had not previously been subjected to DNA testing – Mr. Willis would still be in prison since he had been sentenced to life without parole.

**Rickey Johnson:** Rickey Johnson was convicted in 1983 of aggravated rape and was sentenced to life without parole in Louisiana's Angola Farm Prison. His conviction was secured based upon the strength of conventional serological testing and an eyewitness identification made by the victim. With the case going to trial years before DNA tests were to become a common law-enforcement tool, no DNA tests were performed on the evidence. Throughout his ordeal, Mr. Johnson maintained his innocence and held out hope that the truth would one day be discovered. In 2006, after the Innocence Project took on Mr. Johnson's case, the DA agreed to test vaginal swabs from the rape kit using conventional STR testing. The tests produced just three markers-- enough to potentially exculpate Mr. Johnson, but not a sufficient number to help identify the perpetrator. In 2007, a new form of STR testing, minifiler-STR, was performed. Minifiler-STR makes possible the examination of badly degraded evidence. Through the use of this new technology, eight additional markers were found, yielding a full profile. That profile not only proved Mr. Johnson's innocence, thereby leading to his exoneration, but also enabled the evidence to be run through CODIS. The process resulted in a CODIS hit and the true perpetrator, a man who was housed in the same prison as Mr. Johnson himself, was identified. Mr. Johnson's case shows the promise that new technology holds for solving long forgotten cases and is a testament to the crime solving potential of modern day DNA technology.

**James Waller:** Mr. Waller, a man who was exonerated by DNA testing last year. Although he was released from prison 14 years earlier, it was only when his name was cleared that Mr. Waller truly considered himself free. As an active member of his church group Mr. Waller regularly volunteered to serve food to the homeless. His conviction, however, required him to register as a sex offender upon release. That status meant that he was not allowed to interact with children. As a result, he consistently had to live with the indignity of this label as he sought to better his community by volunteering at the soup kitchen. The emotional toll on Mr. Waller was extraordinary. On the day of his exoneration a few months ago, he stated, "It's been a long, horrible road. This is one of the happiest weeks of my life - I am finally having my day in court, and I will be able to clear my name at long last."